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No. 881

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No._____

AMERICAN LEGION POST NO. 51, *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

On appeal from the
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JURISDICTIONAL STATEMENT

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INDEX

	Page
JURISDICTIONAL STATEMENT	1
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	4
Statement of the Case	5
The Questions Are Substantial	8

INDEX TO APPENDIX

Opinion of Pa. Superior Court	A-1
Pa. Supreme Court—	
Per Curiam Opinion	A-14
Justice Bell, Dissent	A-15
Justice Musmanno, Dissent	A-19

TABLE OF CITATIONS

STATUTE LAW

Pa. Stat. March 31, 1860 P.L. 382—	
Section 60, 18 P.S. 1445	2
Section 61, 18 P.S. 1446	13
28 U.S.C. Section 1272(2)	15

CASE LAW

American Legion Post No. 51 Appeal— 397 Pa. 430, 156 A. 2d 107	13
American Express Co. Vs. Kentucky, 273 U.S. 269	10
Corrigan Vs. Buckley, 271 U.S. 323	10
Lambert Vs. California, 355 U.S. 225	8
Roberts Vs. New York, 295 U.S. 264	10
West Vs. Louisiana, 194 U.S. 258	10
Westmore Vs. Karrick, 205 U.S. 141	10
Wigton's Return, 151 Pa. Super. 337, 30 A. 2d 252	9

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AMERICAN LEGION POST NO. 51, *Appellant*

v.

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On appeal from the

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Court of Pennsylvania, entered November 24, 1959, rehearing denied December 17, 1959, affirming the judgment of the Superior Court of Pennsylvania which affirmed the order of the Court of Quarter Sessions of Fayette County, Pennsylvania, decreeing forfeiture and destruction of appellants' machines, and submits this Statement to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania is reported at 397 Pa. 430, A. 2d 107; which affirmed, per curiam, on the opinion of the Superior Court of Pennsylvania, reported at 188 Pa. Super. 480, 149 A. 2d 483.* The opinion of the Court of Quarter Sessions of Fayette County, Pennsylvania, is reported at 16 Pa. D. & C. 2d 363.

JURISDICTION

This is an in rem proceeding for forfeiture and destruction of multiple coin pinball machines pursuant to Pennsylvania Act of March 31, 1860, P.L. 382, Section 60, 18 P.S. Section 1445. The order of the Pennsylvania Supreme Court was entered on November 24, 1959, and petition for rehearing was denied on December 17, 1959. The notice of appeal was filed in that Court on February 23, 1960.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257(2).

STATUTES INVOLVED

Act of 1860, March 31, P.L. 382, section 60, 18 P.S. Section 1445.

> "It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and

*Reported as In re: Return of Julius A. Trombetta, Sergeant, Pennsylvania State Police

remove any device or machine of any kind character or description whatsoever, used and employed for the purpose of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same. And it shall be the duty of such sheriff, constable or other officer to make return, in writing, to the next court of quarter sessions of the proper county, setting forth the nature and description of the device or machine so seized upon, and the time, place and circumstances under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed, and at the same time order such reasonable costs and charges to the seizing officer as they shall deem adequate and just, to be paid by the owner or possessor of such device or machine, or in case of his default, or in case he cannot be found, to be paid as costs are now by law paid upon indictments; and such adjudication shall be conclusive evidence to establish the legality of such seizure, in any court of this commonwealth, in any cause in which the question of its legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall, upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure, in those cases in which

the said officer returns, or offers to return such device or machine; and in all cases shall prevent a recovery in damages, for any sum beyond the real value of the device or machine seized."

QUESTIONS PRESENTED

1. Is the Pennsylvania Statute, act of March 31, 1860, P.L. 382, Section 60, 18 P.S. Section 1445, when construed to authorize seizure, forfeiture any destruction of Appellant's property because such property might or could be used for unlawful gambling purposes, even though it was not, repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution?

2. Where the said Statute has been previously construed to apply to property actually used or employed for unlawful gambling purposes, but is now for the first time construed to apply to property which might or could be used for unlawful gambling purposes, is not such retroactive application to appellant's property repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution?

3. Is it not inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution for appellant's property to be seized under color of state law, and ordered forfeited and destroyed where such property was not

shown to be used or employed for unlawful gambling purposes, but upon the conjecture that it might or could be so used or employed?

4. Is it not inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution for the appellant's property to be seized under color of state law, and ordered forfeited and destroyed without regard to the use and employment of such property?

STATEMENT OF THE CASE

On June 20, 1957, the Pennsylvania State Police seized various multiple coin pinball machines owned by applicant. A return was made to the Court of Quarter Sessions of Fayette County, Pennsylvania, and petition filed seeking their destruction as gambling devices per se. A rule was issued on June 26, 1957, returnable July 8, 1957, and on July 8, 1957, answer was filed by appellant. Hearings were held commencing July 17, 1957. These proceedings were in rem under the Act of March 31, 1860, P.L. 382, Section 60, 18 P.S. Section 1445.

The machines involved are of a type whereby a coin or coins may be inserted to obtain a number of steel balls. The steel balls are propelled by use of a calibrated plunger onto a horizontal playing field through a maze of pins and fall into holes scattered on the playing field or into a slot at the

bottom of the playing field. Lights are illuminated on a vertical board at the head of the playing field when a ball comes to rest in a hole. Scores are registered on the vertical board, and are determined by the number of balls deposited in the holes and the position of the holes filled by the balls. Certain scores entitle the player to free games. By depositing additional coins, a player may obtain an additional ball, and he may also change his opportunities to secure higher scores and free games. The machines are equipped with a counter that shows the number of free games earned, and a means, called a "knock-down" button, to cancel the free games shown but left unused by players in order to clear the machines for subsequent players. Inside the machines are meters that register the total number of games played (free and paid), and the number of free games cancelled.

There was no evidence offered by the Commonwealth to prove that actual gambling took place on or in connection with these machines, or that money or merchandise, or anything of value, had ever been paid to winners of free games. So far as the record shows, players received only the right to play free additional games, and this is not unlawful gambling. As a matter of fact, the Commonwealth's petition alleged only that the machines involved were gambling devices *per se*. The Commonwealth candidly stated that it desired a determination as to whether the machines are gambling devices *per se*.

The Superior Court of Pennsylvania said that the machines were gambling devices *per se* because it felt a player would not leave free games; hence, the "knock-down" button "obviously" would be used to cancel free games for which the player was compensated. It also said the machines were gambling devices *per se* because it felt that there can be no reward in terms of amusement from the mere insertion of coins into an unresponsive machine. The Court said it could not understand, if free games are all that can be won, why there should be a difference in price charged for playing the machine.

The Supreme Court of Pennsylvania affirmed on the opinion of the Superior Court, two Justices dissenting. The dissenting justices pointed out that the fact that the machines might or could be used for gambling did not make them gambling devices *per se* subject to forfeiture and destruction.

The action of the Supreme Court of Pennsylvania represented the first determination that an item of property could be confiscated under the Pennsylvania laws without a showing that it was in fact used or employed for gambling. It is the first determination in Pennsylvania that such confiscation is justified because the property might or could be used for gambling, even though the evidence showed that it was not. Accordingly, appellant petitioned the Court for reargument asserting that appellant was deprived of due process under

the Constitution of the United States, and that the action of the Supreme Court in forfeiting the machines here involved and directing their destruction violates the Fourteenth Amendment to the Constitution of the United States. This peititon was denied following the answer of the Commonwealth, in which it was averred that the Petition for Reargument presented no new matter not previously considered by the trial court, the Superior Court and the Supreme Court. That the court below considered the federal constitutional problems is indicated in the dissent of Justice Bell in this case, 397 P. 430, 433-34, fn., 156 A 2d 107, 108, fn. 3.

THE QUESTIONS ARE SUBSTANTIAL

The instant case raises serious and substantial questions under the due process clause of the Fourteenth Amendment to the Constitution of the United States with respect to the limitations imposed by that clause upon the confiscatory police power of the states. Although the police-power is one of the least limitable, due process places some limits on its exercise. Cf. *Lambert v. California*, 355 U.S. 225, 228. Further, due process demands from the state fundamental fairness in dealing with private property and in the disposition of litigation in the courts.

Neither gambling, nor unlawful gambling, nor "a device or machine used and employed for gam-

bling" is defined in the law of Pennsylvania. Until the decision of the Pennsylvania Supreme Court in this case, it was clear and settled that the statutory proscription related to the use and employment, and not the nature of the device: "There is nothing in the section which authorizes the seizure and destruction of devices merely on the ground that it would be possible to use them for unlawful gaming." *In re Wigton's Return*, 151 Pa. Super. 337, 343, 30 A. 2d 352, 355. It was, and still is, the law of Pennsylvania that a "free game" does not constitute a thing of value. *In re Wigton's Return*, supra, and the free game feature in this case did not warrant the destruction of the machines here involved. Again, it was the law of Pennsylvania that the presence of a device enabling the cancelling of unused free games does not support a finding that the machines were used for unlawful purposes. *In re Wigton's Return*, supra.

In the instant case, the highest court of the State of Pennsylvania has approved the destruction of the games involved upon the ground that the games *might* or *could* be used for gambling. Admittedly, there is no evidence that these games were actually used for gambling, or even that any evidence of gambling was found on appellant's premises. But the Pennsylvania Supreme Court assumed or was willing to believe that these games would only be used for gambling because it did not think people derived amusement from merely playing them

(and, therefore, they would only play if they were "paid off" for free games).

It is respectfully urged upon this Court that the statute here involved does not tolerate the decision of the Pennsylvania Supreme Court. But this is not mere error of state law.

While an erroneous decision of a state court on matters within its jurisdiction does not deprive appellant of his rights under the federal due process clause, where the error is gross and obvious, indeed arbitrary, such guaranty is violated. See, *Roberts v. New York*, 295 U.S. 264. Here, the determination of the court below is impossible in a rational administration of justice, and is in clear conflict with those fundamental principles which have been established in our jurisprudence for the protection of private rights. See, *American Express Co. v. Kentucky*, 273 U.S. 269; *Corrigan v. Buckley*, 271 U.S. 323; *Wetmore v. Karrick*, 205 U.S. 141; *West v. Louisiana*, 194 U.S. 258. It is submitted that in this case the court below proceeded upon surmise and conjecture, in complete disregard of the evidence in the case. There is not the slightest evidence of unlawful use of the machines involved. On the contrary, there is affirmative evidence that they were used for amusement only. The determination of the courts below that these machines be destroyed rests upon the naive, if not absurd, hypothesis that no one would enjoy playing the games for more than 5c, and therefore

one would play the games only if he were "paid off" on free games! This in the face of positive Commonwealth evidence that even Commonwealth witnesses played the games without expectation of reward, but only for amusement. The determination of the courts below rests upon the broad assertion, which as well applies to almost any amusement device (e.g., playing cards, backgammon boards, etc., *and* the machines approved in *Hilton's Return*, supra), that the games here involved might or could be used for illegal gambling. It is grossly arbitrary to say that these games, which plainly and obviously can be used for pleasure, are illegal *per se* because they also can be used illegally. It is important in this connection to recognize that the courts below did not proceed on the theory, let alone evidence, of which there was none, that games such as those here involved are so much a part of gambling as to warrant the conclusion that they are gambling devices.

The statute involved expressly limits the forfeiture and destruction of property to that "used and employed for the purpose of unlawful gambling." It does not even extend to property intended to be so used.[1] Assuming the decision of the court below to be a proper construction and

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[1] The Pennsylvania legislature was aware of the differences. Section 4604 provides: "Whoever makes, manufactures, or assembles any punch board, drawing card, slot machine, or any machine or device *used or intended to be used for gambling*, is guilty of a misdemeanor . . . ."

application of the statute, then such construction and application makes the statute repugnant to the Fourteenth Amendment to the United States Constitution. To the extent that the class of property condemned consists of that which might or could be used for gambling purposes, such wholesale condemnation is too general and it is arbitrary. It is indefinite, and fails to identify the property subject to destruction. Indeed, men of common intelligence must necessarily guess at its meaning and differ as to its application. One cannot comply with a law so construed and applied, and as so construed and applied it is an unreasonable exercise of the state's police power. Moreover, assuming a statute so applied is effective to prevent the use and permit the destruction of property, due process requires at the minimum that when such application becomes first effective a reasonable time be permitted owners to come into compliance. Here, under the law as construed and applied prior to the decision sought now to be reviewed, the games involved were legal, the standard of the statute being the actual use of and employment for unlawful gambling. If the use of these games is now outlawed because they may be used for gambling, appellant may not be deprived of this property forthwith, since it is only by the decision of the court below in this forfeiture case that he could have learned of the new law. The situation is wholly analogous to the adoption of a statute by a state declaring previously legal prop-

erty illegal; due process requires a reasonable time within which to remove the property, or otherwise deal with it so as to cure the objectionable features, which could easily have been accomplished. On this score, it may be noted that once the seizure was effected, appellant's sole available remedy was to proceed in the forfeiture proceeding. Act of March 31, 1860, P.L. 382, Section 61, 18 P.S. Section 1446.

The issues here involved are of vital importance generally to the proper scope and exercise of police power. They are of vital significance to appellant, whose property is at stake, and who, if it had any reason to suspect that its machines were illegal, could readily have altered them to bring them within *Wigton's Return*. They are important because, as noted by Justice Musmanno, in his dissent, 397 Pa., at 439, 156 A. 2d, at 111:

> "Although the proceedings in this case determine the fate of only 17 machines, the decision will be used throughout Pennsylvania as a death warrant for thousands of other machines, whose value, on a conservative estimate, could easily surpass five million dollars. Should this Court condemn private property so summarily and so ambiguously? Instead of tangling the law in an inextricable thicket of polysyllabic technical nomenclature, should it not specify in words of monkey wrench simplicity just what is or are the gambling features of pin ball machines which doom them to extinction?"

and further (397 Pa., at 445, 156 A. 2d, at 114):

> "The Majority says that the pin ball machines in this litigation are gambling devices but it fails to specify how and why they are gambling devices, which subjects them to execution. The record utterly fails to show that these machines were ever used for gambling.
>
> We thus come to the inevitable conclusion that the Majority has, after a certain amount of technological discussion, arbitrarily condemned them to destruction. I believe that the owners and lessees of similar machines throughout the Commonwealth are entitled to know wherein the machines are illegal and this explanation should be given, in language which will enable them to make such adjustments as will bring the pin ball machines (which are intrinsically harmless) into the realm of legality. The proprietors of five million dollars worth of private property are entitled at least to this. Because the Opinion of this Court does not do this, I must dissent."

Appellant believes that the questions presented by this appeal are substantial and that they are of public importance; that the Pennsylvania statute as construed and applied by the Pennsylvania Supreme Court is repugnant to the due process

clause of the Fourteenth Amendment to the Federal Constitution, and that this Court, therefore, has jurisdiction pursuant to 28 U.S.C. Section 1272(2); and that appellant has also been deprived of his rights under the due process clause of the Fourteenth Amendment by the gross and obvious error of the courts below.

Respectfully submitted,

ANTHONY CAVALCANTE,
Attorney for Appellant.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

SITTING AT PHILADELPHIA

No. 224 APRIL TERM, 1958

In re: Return of JULIUS A. TROMBETTA, Sergeant, Pennsylvania State Police.

AMERICAN LEGION POST NO. 51 APPEAL

OPINION BY HIRT, J., March 18, 1959:

On June 20, 1957, Pennsylvania State Police in concerted action, with the cooperation of local peace officers, seized 41 pinball machines at various restaurants, pool rooms, clubs, and the like, in Fayette County. The machines were all of the Bingo or "in-line" type of machine, manufactured or sold by Bally Manufacturing Company of Chicago. Two separate returns were made to the quarter sessions by Sergeant Trombetta of the State Police who was in charge of the raid. One return identified and described Bally pinball machines which, when seized, were actually being used for unlawful gambling. These machines were adjudged forfeited and were ordered to be publicly destroyed; the action of the court in that respect has not been questioned. We are concerned

here with the rule granted on a petition accompanying a scond return as to 24 of the same type of Bally machines alleged to be gambling devices per se, although not actually in use for that purpose at the time of the seizure. The lower court, after extensive hearings before it en banc, adjudged all of the machines ("listed and described in Exhibit A" of the return) forfeited as gambling devices and ordered their destruction. The proceedings were in rem under the Act of March 31, 1860, P.L. 382, Section 60, 18 PS Section 1445. Among the pinball machines identified in the return there were variations in type and with different names, but admittedly they all are fundamentally the same in character and logic of operation; they all have the same basic features and all are *multiple*-coin "in-line Bingo type pinball machines." Most of the testimony, as well as the exhibits in evidence, had to do with the so-called "Bally Show Time" machines, the latest development of the type, and particularly with a Bally Show Time five cent machine number T 6887.

The appellant leans heavily on Wigton's Return, 151 Po. Superior Ct. 337, 30 A. 2d 352 in arguing for a reversal in this appeal. That proceeding, under the same section of the 1860 Code as in here invoked, was in rem for the destruction of *single*-coin pinball machines. In that proceeding there was no evidence that the players were ever paid off in money or merchandise or that

gambling among the players was permitted on the premises where the machines were seized. What a player could win by playing that type of single coin pinball machine, after the deposit of a coin, was the right to play additional free games and nothing more. And these machines did not have (in the language of Judge KENWORTHY) ". . . the button or mechanical device for canceling the 'free games' nor the recording meter which were used, in the machines in Urban's Appeal. [148 Pa. Superior Ct. 101, 24 A. 2d 756] to facilitate their use for gambling . . ." In the *Wigton* case we held that the right to play a "free game" in itself was neither money nor "other property of value" within the meaning of Section 603 of the Act of June 24, 1939, P.L. 872 relating to gambling devices and their use, although we there recognized, as in *Urban's Appeal*, that the question was debatable under conflicting authorities in various jurisdictions. In all of the machines involved in the present appeal, as with the amusement type of single coin machines before us in *Wigton's Return*, five balls were made available to the player upon the insertion of a single coin and, however extended the play, the machines recorded the successes of the player only in terms of the number of free games won, but there the similiarity ends.

On all the Bally machines the aim of the player in general is to light up 3, 4 or 5 numbers in a row; there are other ends to be attained, however, for

the most part in special features set forth in Commonwealth's Exhibit No. 20. Harold L. Ergott, Jr., a Research Associate in the Department of Electrical Engineering at Pennsylvania State University, and a specialist in the field of electronics, when called by the Commonwealth, testified that from a study of the Bally Show Time machine he had made an analysis of the switch circuits and "the logic in general" of the performance of the machine in operation. His investigation took him into a highly complex field of electronics. Judge BANE, for the court en banc, based upon the testimony of this expert, has accurately described the Bally Show Time machine thus: "It stands about three and one-half (3½) feet high, and has an inclined horizontal playing field, under glass, dotted with numerous pegs, bumpers, rubber rings, spring bumpers, lights and twenty five (25) numbered holes, and one so called 'return ball' hole at the extreme front end of the playing field . . . To the rear of this horizontal playing field rises a vertical score board or back-plate, also under glass, which visibly records the progress of the game, as it is played, as well as the ultimate result. Both boards are attractively and artistically decorated. The vertical score board displays a large card or square, which contains a series of numbers, twenty-five (25) in all, corresponding to the numbered holes on the horizontal playing field. These numbers are joined or connected by vertical; horizontal or diagonal interlocking red, green and yellow

lines. The large square is further subdivided into four (4) small squares, each containing four (4) numbers, called 'magic squares.' At the bottom of the large square are four (4) subdivided horizontal numbers called the 'magic line.' The four (4) magic squares are identified by the letters, 'A,' 'B,' 'C' and 'D,' and the magic line by the letter 'E.' On the front end of the frame surrounding the . . . [inclined] playing field and nearest the player are five (5) buttons, each correspondingly lettered 'A,' 'B,' 'C,' 'D' and 'E.' If a player should be successful in illuminating any one or more of the magic squares, or the magic line, the pressing of the appropriate lettered button permits the player to rotate the four (4) numbers within the lighted square or line to a more advantageous position, thereby enhancing the possibility of his getting three, four or five numbers 'in line.' These in-line numbers must be . . . joined by the yellow, red or green lines, either vertically, diagonally or horizontally, and if so, a win is scored, much as in the game of Bingo." The opinion continues: "Surrounding this numbered square on the vertical score board are the so-called 'extra' game features, represented by appropriate figures. The object of these added features is to encourage the player to try for the opportunity of increasing his chances to win free games. These are scored by a 'free game' recording meter visible to the player in the upper left corner of the vertical score board. Thus the player knows, at any given time the total

number of free games to his credit. Each such free game is equivalent in value, [in continuing the play] to the monetary unit required to operate the machine, and may be used, by pushing a button, for the same purposes which would otherwise be accomplished by the insertion of coins. Each time the player pushes this button, the free games are reduced by one (1) and the meter records this fact. Thereafter, he may continue to use his available free games [without the deposit of coins] until they are exhausted, in which event the meter will have returned to zero. Should he desire to continue further play, he can then only activate the machine by the insertion of a coin, in the slot located on the front or player's end of the machine. Each of these multicoin pinball machines are so designed that they can be altered to take nickels, dimes or even quarters, by merely changing the chute device beneath the coin slot." The machines with which we are concerned were either 5-cent or 10-cent machines.

Mr. Ergott testified that the owner of the machine may control the degree of game difficulty to the player by the manual movement of "adjustment plugs." There are three sets of these adjustment plugs concealed from view of the player. One set controls the number of parallel circuits available for obtaining extra balls. A second set determines the number of possible paths that can be used to get corner advantages (a ball in each of

the four corners gives the player the same number of free games won, as five in line). The third set controls the number of parallel paths which supply voltage through the "reflex circuit" of the machine. In general the greater number of circuit-paths in operation, the greater the advantage to the player. By decreasing the number of parallel circuits normally operating, the chances of increasing one's score are diminished. This witness also found a "type of memory system built into the machine" in a "reflex unit." One relay in operation causes a switch at the back of the machine to rotate counter-clock-wise; but when games are being won a second relay takes over and reverses the switch in the opposite direction, thereby increasing the difficulty of gaining favorable odds and game advantage features. There is also a "control unit" in the machine which by rotating three cams in random action, destroys the possibility of a definite cyclic pattern of operation, upon which a player could rely to his advantage. There are also "score unit discs" which by ingenious electronic devices control the odds on the machine. The first three coins should increase the odds as each of them is put into the machine. Thereafter, however, because of the random operation of the machine, whether a player obtains an increase in odds or other player advantage on deposit of coins, is dependent wholly upon chance. The insertion of additional coins does not guarantee to the player either an increase in odds or the advantage of ex-

tra features. So also, there is a "game proportioning circuit" which may change the degree of difficulty during actual play by relaying information "to a subsidiary circuit that will influence the operation of the other features in the machines."[1] Only one at home in the highly specialized field of electronics here involved, can comprehend the implications of the testimony of the experts in this proceeding.

After referring to the Control Unit, the Reflex Unit, the Mixer and Spotting Dise (making for random operation), and a Magic Square Feature Unit, the witness Ergott stated his conclusions in nontechnical language thus: "It has been determined that the operation of this machine is random in nature and is, therefore, not subject to operations of a cyclic form. However, the circuits are constructed in such a logical order as to insure a high degree of dependence between circuits which produce the 'game features,' i.e., odds, magic squares and selection features. Further it was found that the subject machine contains variable switching functions that may be controlled both automatically and manually. The variations of the switching functions are carried out by the following means: 1. *Adjustment Plugs.* The adjustment plugs constitute a semipermanent change

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[1] Reference may be had to the opinion of the lower court reported 16 Pa. D. & C. 2d 363 for a detailed description of the machines in operation and the interrelated functions of the electronic devices involved.

in logic and are manually set to increase or decrease the game difficulty. 2. *Reflex Unit.* The reflex unit sets the game difficulty according to the ratio of games won to total games played. 3. *Game Proportioning Circuits.* The game proportioning circuits increase the odds of obtaining a new game advantage for each coin inserted into the machine as the game advantages increase. It is therefore seen that the machine has (1) a general difficulty established in part by the owner of the machine, (2) a variable difficulty based on the won-lost record of the machine, and (3) a game difficulty that opposes the obtaining of the maximum game advantage in any given game." Accordingly it must be apparent that the proprietor of an establishment can control the degree of game difficulty by the simple manual adjustment of four plugs; and the electronic devices, referred to as the "electric brain," automatically, as more and more coins are inserted in the machine, decreases the player's chances of winning additional numbers of free games by increasing the hazards of play. The "logic" of automatic operation is not known to the player and he is not aware of the frustrating forces that are working against him.

We have stated that additional free games are the only reward from play, so far as indicated on the face of the machines. The "Visible Replay Meter," on the upper left edge of the backboard of the machine registers, for the information of

the player at every stage of the play, the number of "replays" or free games which he has won. A "Total Play Meter" located on the left, inside the front end of the machines and not visible to the player, records the total number of games paid for by the insertion of coins. On Bally Show Time machine number T 6887, in evidence, as well as on all the machines confiscated, there was a toggle switch or device underneath the machine on the right side, also concealed from view, referred to in the testimony as a "knockdown button." The purpose served by this mechanism is to wipe out the number of free games won on a machine as registered on the Replay Meter, without the playing of any of them. Quite obviously, it must be apparent that no player would allow the cancellation of the only evidence of his winnings from the replay meter, without being compensated by something in return. The third meter is a *concealed* "Replay Meter" located inside the cabinet on the right hand side. Its sole function is to show the number of free games which have been *canceled* by means of the knockdown button. In our view the purpose of this meter cannot be other than to record with accuracy the amount of the payoff. More than any other element in the "logic" of these Bally machines, is the multiple-coin feature which, in conjunction with these three meters in operation, stamps all of the machines gambling devices per se.

There are other considerations which lead to the

same conclusion: There can be no reward in terms of amusement from the mere insertion of coins into an unresponsive machine. If free games are all that can be won it is difficult to understand why there should be a difference in price charged for playing the machine. One cannot possibly get more amusement merely out of depositing 25 cents or even 10 cents instead of 5 cents, in the same type of machine if the reward is the same in all of them. From a reading of the present record we are convinced that the skill of a player in operating the machine has little effect on the ultimate result. The odds are continually against him. And there are evidences of electronic engineering in this case which challenge and nurture the gambling instinct in a player and at the same time limit the amount than can be won. How substantial the profit may be to a proprietor exploiting the machines is suggested by the testimony of the witness Ann Pratt. Over an extended period she played one of the Bally type machines during her lunch period at Carmen's Restaurant, where two of the machines here involved were seized. She lost $86 during one day and she quit playing the machines entirely when her total losses amounted to $3,000. There is a factual false pretense in the tacit appeal of these Bally machines; they pretend to be on the level, but they are nothing of the sort. They are craftily designed, artfully constructed and ingeniously deceptive in their appeal, and in our opinion clearly are gambling devices per se.

We noted in *Wigton's Return*, supra, that the expression "*gambling device*" does not appear in Section 60 of the 1860 Act, as it does in Section 603 of The Penal Code of 1939. However we have held (*Commonwealth v. Kaiser*, 80 Pa. Superior Ct. 26) that "When the nature of the machines is shown to be such as fits them solely for an unlawful purpose, they become, in the language of some of the courts of other states 'outlaws'" and as such are subject to confiscation and destruction under the above section of the 1860 Act. Cf. also, Section 604 of the 1939 Code, 18 PS Section 4604. The settled policy of this Commonwealth, as declared in its legislation, has been opposed to gambling (*Plotnick v. Pa. P.U.C. et al.*, 143 Pa. Superior Ct. 550, 553, 18 A 2d 542) in any form, and gambling by means of "play or device" was specifically made unlawful as early as March 26, 1762 by an enactment of the legislature on that date. 1 Sm. L. 246. The present proceeding has much in common with *Urban's Appeal*, 148 Pa. Superior Ct. 101, 24 A. 2d 756 on the facts, and is ruled by the holding of that case on the law; cf. particularly page 113. Here as in that case, all of the machines listed in the return had been set up for public operation when seized; each of them was equipped with a "knockdown" button to cancel the meter record of free games won; the main purpose of that device, as indicated by the evidence and found by the court was to adapt the machine to the purpose of gambling; all of the machines

seized were of the same type, and there was no basic difference between the present machines and those before the lower court on the other return, which, admittedly, were properly forfeited and destroyed because actually in use for gambling when seized. The courts in other jurisdictions have come to the conclusion that like machines under similar, if not identical, legislation are gambling devices per se. Cf. *State v. Ricciardi*, 18 N.J. 441, 114 A. 2d 257; *State v. Bally Beach Club Pinball Machine*, 119 Vt. 123, 119 A. 2d 876. In the present proceeding the lower court as the judicial fact finder *reasonably* concluded that under all of the evidence the machines in question were gambling devices and were set up to be used for that purpose. Section 60 of the 1860 Code does not require a higher degree of proof. *Urban's Appeal*, supra, p. 113. The evidence supports the finding in this proceeding in rem that the machines in question are gambling devices per se. The order forfeiting the machines and directing their destruction, therefore was proper. Cf. *Mills Novelty Company's Appeal*, 316 Pa. 449, 175 A. 548.

Order affirmed.

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 164 MARCH TERM, 1959.

In re: Return of JULIUS A. TROMBETTA, Sergeant, Pennsylvania State Police.

APPEAL OF AMERICAN LEGION POST NO. 51

Rehearing denied December 17, 1959.

Before CHARLES ALVIN JONES, C.J., and BELL, MUSMANNO, BENJAMIN R. JONES, COHEN and BOK, JJ.

OPINION PER CURIAM, November 24, 1959:

The order of the Superior Court affirming the order of the court below, forfeiting the pinball machines in controversy and directing their destruction is affirmed on the opinion of Judge HIRT, reported at 188 Pa. Superior Ct. 480.

Mr. Justice MCBRIDE took no part in the consideration or decision of this case.

Mr. Justice BELL and Mr. Justice MUSMANNO filed separate dissenting opinions.

DISSENTING OPINION BY MR. JUSTICE BELL:

Seventeen pinball machines were seized by the Pennsylvania State Police at various establishments in Fayette County on June 20, 1957, including the American Legion Post No. 51. The Quarter Sessions Court sustained the position of the Commonwealth that these machines were gambling devices *per se* under the provisions of Section 60 of the Act of March 31, 1860, P.L. 382, 18 PS Section 1445. There was no testimony offered to prove that actual gambling took place on or in connection with these machines,* or that money or merchandise, or anything of value, had ever been paid to the winners. So far as the record shows, the only prize or reward which a winner received was the *right to play free additional games*, and this is not unlawful gambling. Furthermore, although it is easy to believe that the machines were frequently used for unlawful gambling, the evidence in this record does not, in my opinion, justify the majority's conclusion that these machines were manufactured or used and employed *solely* for the purpose of unlawful gambling.

Section 60, supra, provides: "It shall and may be lawful for any sheriff . . . to seize upon, secure and remove any device or machine of any kind,

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* 20 other machines which were actually used for gambling purposes at the time of their seizure, were validly confiscated by the police.

character or description whatsoever, *used and employed for the purpose of unlawful gambling*** . . . and to arrest . . . any person setting up the same . . . and the said Court . . . is satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed . . . .".

The question involved is whether these pinball machines—considering the details of their construction and the evidence in the case—are illegal *per se*. Neither gambling, nor unlawful gambling, nor "a device or machine used and employed for unlawful gambling" is defined in the Act. There is no doubt that if and when these or any other machines are actually used for unlawful gambling they are illegal and may be seized and confiscated by the Commonwealth.

It is Hornbook law that a Penal Statute must be strictly construed: Act of June 24, 1939, P.L. 872, 18 PS Section 5104; Act of May 28, 1937, P.L. 1019, Art. IV, Section 58, 46 PS Section 558; *Commonwealth ex rel. Varronne v. Cunningham*, 365 Pa. 68, 73 A. 2d 705; *Commonwealth v. Morgan*, 278 Pa. 395, 123 A. 337; *Commonwealth ex rel. Keiffer, v. Ceraul*, 182 Pa. Superior Ct. 511, 126 A. 2d 805. Admittedly there is no evidence that these machines were used or employd for th purpose of

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** Italics throughout ours.

unlawful gambling. Moreover, in my judgment, if these machines can be used either for pleasure *or* for unlawful gambling purposes, that is not sufficient to make them illegal *per se,* or to justify their confiscation and destruction by the Commonwealth. The evidence and the aforesaid authorities furnish a complete and decisive determination —adverse to the Commonwealth—of the question involved in the instant case.

In view of the fact that the argument and the various Court opinions have taken such a wide range, I shall discuss several of the points relied upon.

What is unlawful gambling, and what is a gambling device or machine within the meaning of Section 60? It may be helpful to also consider Section 604* of the Act of June 24, 1939, P.L. 872 (The Penal Code) which provides: "Whoever makes, manufactures, or assembles any punch board, drawing card, slot machine, o any machine or device *used or intended to be used for gambling,* is guilty of a misdemeanor . . . ." Gambling itself is difficult to define; however, it involves the payment to the winner of money or

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* Section 605 of the Act of June 24, 1939, P.L. 872 provides: "Whoever sets up or establishes . . . any game or device of address, or hazard, at which money or other valuable thing *may* or shall be played for, or staked or betted upon . . . is guilty of a misdemeanor . . . . This section shall not be construed to apply to games of recreation and exercise, such as billiards, bagatelle, ten pins, etc., where no betting is allowed." In my judgment, by using "may," this section is unconstitutional.

something of value, and it is not limited to games or bets which are dependent *solely* upon chance; bets on games, or playing machines, etc., for money or something of value, even though the games or machines involve a combination of both skill and chance, and can be played for pleasure, may amount to unlawful gambling: Cf. *Wigton's Return*, 151 Pa. Superior Ct. 337, 30 A. 2d 352.

A few examples will illustrate my differences with the majority and additional reasons for my dissent.

A backgammon board can be used for pleasure or for gambling*—it is common knowledge that it is usually used for purposes of gambling, and in the latter event a few dollars change hands. A bridge table can be used for pleasure or for gambling; it is common knowledge that it is usually used for gambling. The players play for 1/40th of a cent to a penny a point, and ten cents to a few dollars change hands every evening. In each of these games a vast majority of the players are unskilled, and those who are inexperienced or unskilled loudly proclaim to uninterested companions that the winners won by chance, i.e., the roll of the dice or the luck of the draw, and that chance is far more important than skill. Take an extreme example: A golf course is built for recreation, ex-

* See also other examples given in the illuminating dissenting opinion of Mr. Justice MUSMANNO.

ercise, air, companionship and (when you are playing well) for pleasure. Yet it is a matter of common knowledge that in nearly every golf match the players bet a dollar on the match, or a dollar Nassau,* or the drinks, and a few dollars change hands in the Clubhouse on the 19th hole. I am convinced that no one could successfully contend that all bridge tables, all backgammon boards and all Clubhouses which have a 19th hole, are illegal *per se* and can be seized, confiscated and destroyed by the Commonwealth.

What disturbs me is that if we hold that these particular pinball machines are illegal per se, very many other tables, devices, machines and clubhouses, which can be used for recreation and pleasure, but are frequently used for some gambling, would have to be ruled illegal per se under The Penal Code of 1939.

For these reasons I dissent.

DISSENTING OPINION BY MR. JUSTICE MUSMANNO:

I am opposed to gambling—intellectually, morally, and religiously. Moreover, the law of the Commonwealth prohibits gambling. Thus, no observation in this Opinion is to be interpreted as anything less than an unreserved disapprobation of

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* This does not include special golf tournaments following a Calcutta pool, or other auction.

gambling, which has nothing to recommend it but a wild desire to obtain lucre without labor, finance without fatigue, and quid without quo.

However, the condemnation of gambling, or any other evil for that matter, should not be so loosely applied that it strikes down perfectly legitimate and innocuous pastimes. Many bridge players play for money but this would not justify the outlawing of bridge. Golf players sometimes make their game a little more dramatic by betting on the score but who would outlaw this healthful diversion because of a dollar or two which might change hands at the 18th hole? There is never a World Series but that baseball enthusiasts wager on the results, but to condemn and outlaw the World Series because fans bet on the scores, runs, hits, strikeouts and homeruns emerging from any particular game or all of them would provoke millions of Americans to their feet crying "Injustice!"

Yet, according to the argument advanced by the Commonwealth in this case, bridge, golf and the World Series could be enjoined. Counsel for the Commonwealth, in the oral presentation of his case, said that any device which is employed in a gambling operation may be confiscated and destroyed by the government. From the bench I put to him the proposition: "Suppose that bystanders bet on the number of Cadillacs which would pass a certain street corner at a certain time. Would you say that in such a situation, the Cadillacs

would be amenable to legal forfeiture?" Counsel unabashedly replied that if the Cadillacs were used in the gambling operation, they would become illegal devices and therefore subject to condemnation and destruction. But how would the Cadillac-destruction, under those circumstances, differ from the maceration of playing cards, the ploughing under of golf links, and the razing of baseball stadia?

The pinball machines involved in this litigation could be gambling devices, and, if manufactured, sold, and operated for the sole purpose of unlawful gambling, would indubitably fall beneath the smashing hammer of gambling laws, but it is not enough to say that merely because, like the hypothetical Cadillacs, they *may* be employed for gamglinb, they should be reduced to scrap iron and tin.

The law of this Commonwealth, up until today's decision, forbade so purposeless a destruction of private property. The Superior Court said in *Wigton's Return*, 151 Pa. Superior Ct. 337, 343: "The legislative emphasis in Section 60 of the Act of 1860 is on *use and employment*, not the nature of the device. The expression 'gambling device' does not appear anywhere in the section although it does appear in Section 603 of the Penal Code. It condemns 'any device or machine of *any kind, character or description whatever*, used and employed for the purposes of unlawful gaming as aforesaid.' On the other hand, the authority to de-

stroy them is limited to cases in which the court 'is satisfied that such device or machine was *employed* and *used* for the purpose of unlawful gaming as aforesaid.' There is nothing in the section which authorizes the seizure and destruction of devices MERELY ON THE GROUND THAT IT WOULD BE POSSIBLE TO USE THEM FOR UNLAWFUL GAMING." (Italics in original opinion, capitals mine.)

The evidence in the case before us merely shows that *it would be possible* to use the 17 seized pinball machins for gambling. In the entire printed record of 500 pages there does not appear the slightest evidence to show that they were *actually* used for gambling.

In *Commonwealth v. Kaiser*, 80 Pa. Superior Ct. 26, the Superior Court said: "When the nature of the machine is shown to be such as fits them solely for an unlawful purpose, they become in the language of some of the courts of other states 'outlaws.'

Generally speaking, are pinball machines fitted so that they may be used *solely* for an unlawful purpose? The answer is an obvious negative. Pinball machines can be found in railroad stations, airport terminals, and amusement parks where they are manifestly played for amusement and pastime alone. The very expert called by the Commonwealth in this case testified that while in the United States military service he often played pin-

ball machines for pastime: "Q. But it was a pleasant way to spend your time? A. Yes, sir. Q. Did you win free games on the machine? A. Yes, sir. Q. Did you get paid off? A. No, sir. Q. Would it have been possible to get paid on that device? A. I suppose so. Q. You could have gambled with a friend of yours, could you not? A. I could have gambled on it. Q. Did you ever see anyone paid off at the PX? A. No, I didn't."

This same Commonwealth expert testified, contrary to the theory advanced by the Commonwealth, that skill may be developed in playing pinball machines: "Q. Have you watched those machines being played? A. Yes, I have. Q. Have you seen a difference in the skills of various players? A. Yes, they differ. Q. How many times, Professor, would you say you have played pinball machines? A. I wouldn't have any idea, sir. Q. One hundred times? A. Maybe five hundred times."

The Majority has adopted the Opinion of the Superior Court in this case as its own, so that, therefore, I will refer to it as the Majority Opinion. The Majority Opinion affirms the judgment of the lower Court, ordering the destruction of 17 pinball machines, on the basis that they are gambling devices per se, but it fails to specify how and why they are such devices. Without intending any disrespect, I would say that much of the Majority Opinion reads as if it might be a technical description of a highly intricate complex electronic space-

traveling rocket. It speaks of parallel circuits, reflex circuits, voltage, circuit-paths, reflex unit, three cams, random action, cyclic pattern, score unit discs, electronic devices, spotting disc and an electric brain! After using this kind of language, the Majority admits, almost apologetically, that "Only one at home in the highly specialized field of electronics here involved, can comprehend the implications of the testimony of the experts in this proceeding."

If the Majority does not understand what it is writing, how can it expect police officers throughout the State to be guided by its decision? A judicial decision should be a searchlight before it becomes a guillotine.

Although the proceedings in this case determine the fate of only 17 machines, the decision will be used throughout Pennsylvania as a death warrant for thousands of other machines, whose value, on a conservative estimate, could easily surpass five million dollars.* Should this Court condemn private property so summarily and so ambiguously? Instead of entangling the law in an inextricable thicket of polysyllabic technological nomenclature, should it not specify in words of monkey wrench simplicity just what is or are the gambling features of the pinball machines which doom them to extinction?

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* It was later ascertained that the total value of these machines would amount to $17,000.00!

The Act of June 24, 1939, P.L. 872, 18 P.S. 4605, provides: "Whoever sets up or establishes or causes to be set up or established any game or device of address or hazard, at which money or other valuable thing may or shall be played for, or staked or betted upon . . . is guilty of a misdemeanor."

The player of a pinball machine does not and cannot collect money from the machine. The Commonwealth expert admitted that in his examination of the machines in custody he did not find anything which would give to the player "any money, coins or tokens, or any other objects that are redeemable in either cash or merchandise." What, then, can the player win? He can win the right to play extra games without paying for them. But such an authorization or privilege is not a "valuable thing" within the meaning of the statute. The Superior Court has spoken to this very effect: "Bearing in mind that penal laws must be strictly construed, we are not persuaded that the legislature intended a definition of gambling broad enough to make unlawful, gaming in which the player, in addition to the pleasure of playing, stands to gain nothing but the right to play again without paying for it and the loser to lose nothing but the compulsion to let him play. We hold that the 'free games' feature does not warrant the destruction of the machines as devices used for the purpose of unlawful gaming." (*Wigton's Return*, supra, page 343.)

But, it is argued by the Commonwealth, the machines are equipped with certain "features" which, of themselves, make the machines gambling devices. One of those accused "features" is the so-called knock-down button, the manipulation of which cancels free games won by the player up to that time. The Superior Court has said that such a contrivance is not enough to illegalize the machine: "We hold that the mere fact that these machines are so constructed that it is possible to cancel some of the 'free games' without playing them is not, by itself, sufficient evidence to support a finding that they were used for the purpose of unlawful gaming." (*Wigton's Return*, supra, p. 346.)

Although the Commonwealth sees in the knock-down button sinister implications, it cannot be denied that the erasing button can serve perfectly lawful functions. If a player, for any reason, leaves the machines without playing all the games to which he is entitled, the proprietor, by means of the knock-down button, clears the machine so that the succeeding player may start afresh.

I believe that *Wigton's Return* controls in this appeal. The Majority attempts to distinguish *Wigton* from the present case, but the attempted contrasting, so far as legal principle is concerned, is like drawing a distinction between peas in the same pod. The Majority says: "In that proceeding [the *Wigton* case] there was no evidence that the players were ever paid off in money or mer-

chandise or that gambling among the players was permitted on the premises where the machines were seized." The same situation obtains in the case at bar.

The Majority says: "What a player could win [in the *Wigton* case] by playing that type of single coin pinball machine, after the deposit of a coin, was the right to play additional free games and nothing more." *That* is all the player can win in the machines which are the subject of this lawsuit, namely, the right to play additional free games; nothing more. The fact that after the games have been played, the score may be used as a basis for the payment of money does not make the machine illegal any more than the exchange of money between players at the end of a golf game metamorphoses golf into illegality. Because gamblers bet on a horse is no excuse for shooting the horse. A horse can be used for purposes other than circling a race track to the accompaniment of cheering and groaning money-betting winners and losers.

The grievous fault in the Majority Opinion is that it fails to differentiate between machines which are evil *per se* and those which may become evil by use. It is to be remembered that these proceedings are in rem. The machines themselves are the subject of the litigation; they are the ones that stand to be annihilated if they are proved to be gambling devices per se. A gambling machine *per*

se is one which, without human intervention, deprives the player of money, or valuable thing, as the result of mere chance, or, worse yet, as the result of mechanical planning, works odds against him.

The slot machine notoriously falls within such a category. The person who puts coins in a slot machine looks hopefully for a shower of coins in return. The machine is so contrived, however, that in order to refresh the occasional player with a monetary shower, many others must suffer the Sahara of an unrelieved drought. Thus, the slot machine, well-termed a "one-armed bandit," is subject to condemnation and execution because it is built for the very purpose of deceiving the innocent, robbing the unwary, and emptying the pockets of the conceited gambler who thinks himself smarter than nuts, bolts, screws and pistons all coordinating to beat him. The slot machine player has but one purpose and that is to gain money. The pinball player may or may not be interested in gaining money. He may actually play merely for entertainment, pastime and enjoyment, just as the Commonwealth expert himself admitted he had done for some five hundred times.

The Commonwealth detects gambling in the meters with which the pinball machines are equipped. There is no doubt that these meters can be utilized for the purpose of determining whether a player should receive money from the proprietor or les-

see, but they may also be bookkeeping devices to keep the record straight as to whether the player is paying for his games. Since the machine is, in its nature, a competitive one, (the player seeking to win a score which will entitle him to free games, and the machine itself contesting to prevent such free games), a scorekeeper, mechanical or human, is inevitable. When the proprietor of the machine comes to collect the money in the coin box he must know how many games have been played in order to make certain that the machine has not been tampered with. Thus, a meter or a number of meters, *are indispensable in ascertaining how many* games have been paid for, and how many became gratuitous through the skill of the player.

The Majority Opinion says: "More than any other element in the 'logic' of these Bally machines, is the multiple-coin feature which, in conjunction with these three meters in operation, stamps all of the machines gambling devices per se."

After this portentuous pronouncement the Majority Opinion moves on to something else. It does not say *why* the multiple-coin feature makes the pinball machine a gambling device *per se*. There is nothing inherently wrong about multiple coins. One deposits multiple coins in a pay telephone, one inserts multiple coins in a phonograph-playing machine, one presses multiple coins into candy and cigarette-vending machines—all legally. Thus,

the phrase "multiple-coin" does not conjure up anything sinister, anything hydraheaded and Gorgonian which of itself calls for decapitation. The statement by the Majority on multiple-coins is not judicial, but legislative. But, when the law of Pennsylvania is to categorically condemn multiple-coin devices, that law must be pronounced by the Legislature, not by the Courts.

The fact that the multiple-coin machines *may* be used for gambling purposes cannot ipso facto make them unlawful gaming. As Judge KENWORTHY said: "It may be that the proprietors of the machines involved in this case will use them for unlawful gaming. But even if we were fearful of that development we have no power to make a broad, sweeping, prophylactic rule; *the legislature has given us no such authority.*" *(Wigton's Return*, supra, p. 345) (Emphasis supplied).

The Majority finds no amusement in pinball machines. Neither do I, but I would not condemn them for that reason. There are many games which absorb the attention of mankind which leave me quite indifferent. Pool playing to me is the pedestrianism of a caged bear, card playing is a bore, quoits dull, tug-of-war infantile, ping pong an agitated checkers game. But there was a time when I found all these pastimes interesting and there are many who would rather sit on the edge of their chairs watching the unfoldment of a thrilling card game of solitaire than to follow a shoot-

ing, yelling Westerner on television. This is all a matter of taste and inclination, and we have no authority whatsoever to interfere with the pastime of the people. All these games may become the media for gambling, but they are not, for that reason, to be thrown against a blank wall and executed like the fateful Cadillacs which drew the fire of Commonwealth's counsel at the oral argument.

The Majority says: "There can be no reward in terms of amusement from the mere insertion of coins into an unresponsive machine."

This is about as platitudinously dreary a statement as one would not want to encounter in a judicial opinion. Of course, there is no amusement from the "mere insertion of coins into an unresponsive machine." There is no reward either from dropping coins in a telephone box but there can be a rewarding experience in the conversation which follows. There is no reward in paying money at a box office, but there is a rewarding experience in the theatrical performance which is seen.

The Majority, in signing the death warrant of the 17 pinball machines, says: "They [the pinball machines] are craftily designed, artfully constructed, and ingeniously deceptive in their appeal, and in our opinion clearly are gambling devices per se." This imparts no enlightenment whatsoever to the pinball machine owner as to

what is wrong about the machine. To say that machines are craftily designed and artfully constructed means nothing, so far as deciding the issues in this lawsuit is concerned. Television sets are craftily designed and artfully constructed. Then, to say that the pinball machines are "ingeniously deceptive" is about as informative to the public as to say that sleight-of-hand is ingeniously deceptive. Many innocuous devices in amusement parks, carnivals and on boardwalks at seaside resorts are made up of the most ingeniously deceptive and complicated machinery in order to offer divertisement and delectation to children and grown-up juveniles, but this does not make them *mala in se*.

In summing up I would say the following. A pinball machine in itself is not a gambling device. That much must be admitted by the Commonwealth. A normal pinball machine is as innocuous as bingo which, in some ways, it attempts mechanically to reproduce. Of course, the machine, like any other apparatus, device, game, sport, or diversion, may be turned into a gambling instrument. The person who employs that gambling instrument for gaming may be prosecuted under the State gambling laws. The instrument, however, may not be forfeited and destroyed unless it cannot be used for any purpose other than gambling.

The Majority says that the pinball machines in

this litigation are gambling devices but it fails to specify how and why they are gambling devices, which subjects them to execution. *The record utterly fails to show that these machines were ever used for gambling.*

We thus come to the inevitable conclusion that the Majority has, after a certain amount of technological discussion, arbitrarily condemned them to destruction. I believe that the owners and lessees of similar machines throughout the Commonwealth are entitled to know wherein the machines are illegal and this explanation should be given, in language which will enable them to make such adjustments as will bring the pinball machines (which are intrinsically harmless) into the realm of legality. The proprietors of five million dollars worth of private property are entitled at least to this. Because the Opinion of this Court does not do this, I must dissent.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 886 831

AMERICAN LEGION POST NO. 51,

Defendant Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff Appellee

On Appeal from the Supreme Court of Pennsylvania, Western District.

MOTION TO DISMISS

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INDEX TO BRIEF

	Page
Motion To Dismiss	1
Statement	2
Questions Presented	4
Argument	5
Conclusion	6

TABLE OF CASES

Archbishop O'Hara's Appeal, 389 Pa. 35, 131 Atl. 2d 587	5
Bailey v. Anderson, 326 U.S. 203, 206, 66 S. Ct. 66, 90 L. Ed. 3	5
Brown v. Massachusetts, 144 U.S. 573, 580, 12 S. Ct. 757, 36 L. Ed. 546	5
Hulbert v. Chicago, 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026	5
John v. Paullin, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381	5
Montgomery County Bar Association v. Rinalducci, 329 Pa. 296, 197 Atl. 924	5
Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941	5
United States v. Korpan, 354 U.S. 271, 77 S. Ct. 1099, 1 L. Ed. 2d 1337 (1957)	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 188

American Legion Post No. 51,

Defendant-Appellant

v.

Commonwealth of Pennsylvania,

Plaintiff-Appellee

On Appeal from the Supreme Court of Pennsylvania, Western District.

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the courts of Pennsylvania.

2. The appeal does not present a substantial Federal question.

STATEMENT

On June 20, 1957, the Commonwealth instituted an *in rem* proceeding under the Act of March 31, 1860, P. L. 382, §60; 18 P.S. §1445, seeking the forfeiture and destruction of certain multiple-coin pinball machines on the ground that they were gambling devices *per se*. The same type of machines were before this Court in the case of *United States v. Korpan*, 354 U.S. 271, 77 S. Ct. 1099, 1 L. Ed. 2d 1337 (1957) (R. 414a-416a).

Appellant filed an answer to a petition which sought the destruction of the machines, but did not raise therein any State or Federal Constitutional questions (R. 12a-15a). At the hearing before the trial court, Appellant did not raise any Federal Constitutional questions, and the trial court's opinion [1] ordering the forfeiture and destruction of the machines, does not mention, discuss or pass upon any such questions.

On appeal to the Superior Court of Pennsylvania no Federal Constitutional questions were raised. In fact, Appellant's brief in that court stated the questions to be as follows:

"QUESTIONS INVOLVED

"Did the Court below err in holding that multiple-coin pinball machines were gambling devices *per se* where there was no evidence in the record to prove that such machines:

[1] *Trambetta Return*, 16 Pa. D. & C. 2d 363 (1958

"A. Were used or employed as gambling devices, or

"B. Were so constructed that they could be used solely for unlawful purposes?

(Negatived)."

The opinion of the Superior Court[2] does not mention, discuss or pass upon any Federal Constitutional questions.

A petition for leave to appeal to the Supreme Court of Pennsylvania was granted, but no Federal Constitutional questions were presented therein. Appellant's brief therein stated as the issues involved, the same question (previously quoted) presented to the Superior Court. The *per curiam* affirmation by the majority of the Supreme Court does not mention, discuss or pass upon any Federal Constitutional questions.[3]

After decision in a petition for reargument, which was denied without opinion by the State Supreme Court, Appellant for the first time made general averments intended to raise Federal Constitutional issues.

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[2] *American Legion Post No. 51 Appeal*, 188 Pa. Superior Ct. 480, 149 A. 2d 483 (1959).

[3] Appellant attempts to comply with Rule 15 1(d) of this Court by making reference to the dissenting opinion of one Justice as indicating that the State Supreme Court "considered the federal constitutional problems". The statement in a footnote to Justice Bell's opinion relates to the constitutionality of a *different penal statute from the one directly involved in this case.*

QUESTIONS PRESENTED

1. Where Federal Constitutional questions are not raised in proceedings under a state penal statute involving the seizure of multiple-coin pinball machines as gambling devices, either in the state trial or appellate Courts, and the opinions and orders of such Courts do not mention, discuss or pass on any Federal questions, does the jurisdiction of the Supreme Court of the United States attach on appeal from a state judgment ordering the destruction of such machines?

2. Where a state statute authorizes the seizure and forfeiture of gambling devices, and the sole issue presented to the state Courts is the interpretation of such statute as applied to multiple-coin pinball machines, but the constitutional validity of the statute is not challenged, is there a substantial Federal question involved?

ARGUMENT

1. THE FAILURE TO RAISE FEDERAL CONSTITUTIONAL QUESTIONS IN THE STATE COURTS

Prior to the final judgment of the Supreme Court of Pennsylvania in this case, appellant did not raise any Federal Constitutional questions. The validity of the state statute involved was never challenged. The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the Federal questions involved were raised in the state courts at the proper time: *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026; *Brown v. Mass.*, 144 U.S. 573, 580, 12 S. Ct. 757, 36 L. Ed. 546; *John v. Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381.

Appellant's attempt to raise such questions in a petition for rehearing *after* judgment was, we submit, improper: *Sayward v. Denny*, 158 U.S. 180, 15 S. Ct. 777, 39 L. Ed. 941. In any event, the petition was denied without opinion: Cf. *Bailey v. Anderson*, 326 U.S. 203, 206, 66 S. Ct. 66, 90 L. Ed. 3.

Further, the law of Pennsylvania requires that constitutional questions be raised in the trial court and, if not, they will not be considered on appeal: *Archbishop O'Hara's Appeal*, 389 Pa. 35, 46, 131 A. 2d 587; *Montgomery County Bar Association v. Rinalducci*, 329 Pa. 296, 298, 197 A. 924.

2. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellant submits that Federal constitutional questions may not be presented to your Honorable Court unless the precise questions have been placed in issue before the state courts. This basic procedural requirement is completely absent in this case.

At all stages, this case has involved only the interpretation of a state statute as applied to multiple-coin pinball machines, and was decided solely on the basis of state law. Appellant's jurisdictional statement confirms this fact in explaining the decision of the Superior Court (page 7).

CONCLUSION

For all of the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

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